

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.)
and KENDALL COUNTY LAND AND)
CATTLE, LLC,,)

Petitioner,)

PCB No. 09-43

v.)

COUNTY BOARD OF KENDALL COUNTY,)
ILLINOIS,)

Respondent.)

NOTICE OF FILING

TO: All Counsel of Record (see attached Service List)

PLEASE TAKE NOTICE that on March 4, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Grundy County's Motion to Intervene and Grundy County's Memorandum of Law in Support of its Motion to Intervene, copies of which are attached hereto.

Dated: March 4, 2009

Respectfully submitted,

On behalf of GRUNDY COUNTY, ILLINOIS

/s/ Charles F. Helsten

Charles F. Helsten
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WASTE MANAGEMENT OF ILLINOIS, INC.)
AND KENDALL COUNTY LAND AND)
CATTLE, LLC,)
)
Petitioners,)
vs)
)
COUNTY BOARD OF KENDALL COUNTY,)
ILLINOIS)

PCB 09-043

(Pollution Control Board Facility
Siting Appeal)

GRUNDY COUNTY'S MOTION TO INTERVENE

NOW COMES The County of Grundy by and through its attorneys, State's Attorney Sheldon Sobol, and HINSHAW & CULBERTSON LLP, and for its Motion to Intervene, states as follows:

1. In this appeal, the Applicants seek to overturn Kendall County's finding that the Applicants' request for siting approval should be denied because the design and/or location of the proposed landfill facility failed to protect the public health, safety, and welfare, and because it was not so located as to minimize incompatibility with the character of the surrounding area and minimize the effect on the value of surrounding property.

2. The proposed landfill threatens the public health, safety, and welfare of Grundy County residents by threatening the aquifer from which many County residents obtain their water, by potentially damaging the Aux Sable watershed basin downstream of the proposed landfill facility, by endangering air traffic at and near the Morris Community Airport, and by adversely impacting Grundy County traffic and roads.

3. Although both Kendall County and Grundy County share certain common interests with respect to the proposed landfill, Grundy County also has interests that are separate and distinct from those of Kendall County, and therefore Kendall County cannot and should not be expected to advance the interests unique to Grundy County in this appeal.

4. The Board's rules provide for intervention by persons who may be materially prejudiced absent intervention, or who are so situated that they may be adversely affected by a final Board Order. 35 Ill.Adm.Code 101.402(d)(2), (3).

5. Grundy County was a participant in the proceedings below, and the evidence amply demonstrated that its interests are at issue in this appeal. Because Grundy County's residents may be materially prejudiced absent intervention, and because they are so situated that they may be adversely affected by a final Board Order, Grundy County should be permitted to intervene.

6. The risk to its residents' health and safety created by this appeal gives rise to a duty on the part of Grundy County to intervene, and the circumstances make Grundy County's intervention appropriate under the Board's Rules.

7. Inasmuch as the record on appeal was certified less than two weeks ago, on February 23, 2009, Grundy County's Motion to Intervene is timely and Grundy County's intervention in this appeal will not cause undue delay, will not materially prejudice the proceeding, and will not otherwise interfere with an orderly or efficient proceeding.

WHEREFORE, for the reasons set forth above, and as more fully discussed in the accompanying memorandum of law in support, Grundy County respectfully requests that this Board grant this Motion to Intervene.

Dated: March 4, 2009 Respectfully submitted,

Grundy County, Illinois

By:

/s/ Charles F. Helsten

One of Its Attorneys

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COUNTY BOARD OF KENDALL COUNTY,)
ILLINOIS)

PCB 09-043

(Pollution Control Board Facility
Siting Appeal)

**GRUNDY COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO INTERVENE**

NOW COMES The County of Grundy by and through its attorneys, State's Attorney Sheldon Sobol, and HINSHAW & CULBERTSON LLP, and for its Memorandum of Law in Support of its Motion to Intervene, states as follows:

INTRODUCTION

In this appeal, the Applicants seek to overturn Kendall County's denial of the Applicants' request for siting. Kendall County denied the request because the design and location of the proposed landfill facility failed to protect the public health, safety, and welfare, and because the proposed site was not so located as to minimize incompatibility with the character of the surrounding area and minimize the landfill's effect on the value of surrounding property.

If the Applicants are successful, the resulting landfill will endanger the public health, safety, and welfare of Grundy County residents by threatening the integrity of the area aquifer from which many Grundy County residents derive their water, by risking downstream damage to the Aux Sable watershed basin through improvident surface water runoff from the proposed facility, by endangering air traffic safety at and near the Morris Community Airport, and by adversely impacting traffic and roads in Grundy County.

Grundy County's interests with respect to the proposed landfill are separate and distinct

from those of Kendall County, inasmuch as the facility would impact the two counties in unique and different ways. As a result, Kendall County cannot and should not be expected to advance the interests which are unique to Grundy County in this appeal. Accordingly, unless Grundy County intervenes, the interests of its residents will be unrepresented in these proceedings.

The Board's rules provide that persons may intervene in any adjudicatory proceeding if, *inter alia*, they may be materially prejudiced absent intervention (35 Ill. Adm. Code 101.402(d)(2)), or if they are so situated that they may be adversely affected by a final Board Order (35 Ill. Adm. Code 101.402(d)(3)). Here, the evidence in the proceedings below amply demonstrated that the County and its residents would be placed at risk if the proposed landfill were approved and constructed, thus, they may be materially prejudiced absent intervention. The record on appeal further substantiates the fact that County residents are so situated that they may be adversely affected by a final Board Order regarding the proposed landfill siting.

Because this appeal places Grundy County's residents at risk, Grundy County has a duty to intervene in order to protect their health, safety, and welfare. Moreover, the record on appeal was certified only two weeks ago, therefore the request to intervene is timely and would cause no undue delay, would not materially prejudice the proceeding, and would not otherwise interfere with an orderly or efficient proceeding. The Board should, therefore, grant Grundy County's Motion to Intervene.

ARGUMENT

The Illinois Supreme Court observed in *Pioneer Processing, Inc. v. E.P.A.*, 102 Ill.2d 119, 464 N.E.2d 238, 79 Ill. Dec. 640 (1984), that under the State constitution, the Attorney General acts as "the law officer of the people." *Id.* at 137, citing *E.P.A. v. P.C.B.*, 69 Ill.2d 394, 372 N.E.2d 50, 14 Ill. Dec. 245 (1977). In *Pioneer Processing*, the Court observed that:

as chief legal officer of this State, [the Attorney General] has the duty and authority to represent the interests of the People of the State to insure a healthful environment. In recognition of the Attorney General's role to insure a healthful environment, he has been given the power and authority 'to prevent air, land or water pollution within this State by commencing an action or proceeding in the circuit court of any county in which pollution has been, or is about to be, caused or has occurred, in order to have such pollution stopped or prevented either by mandamus or injunction.' (citation omitted). If, in fact, the Agency failed to afford the citizens of this State the proper procedures relating to the issuance of Pioneer's permit, then we believe it is only proper for the Attorney General to be the People's representative...

Pioneer Processing, 102 Ill.2d at 138, 464 N.E.2d at 247 (emphasis added).

Thereafter, in *Land and Lakes v. P.C.B.*, 245 Ill.App.3d 631, 640, 616 N.E.2d 349, 355 (3rd Dist. 1993), the Illinois Appellate Court held that because a State's Attorney, like an Attorney General, is a constitutional office-holder, he or she has "the duty and authority to represent the interests of the People of the State to insure a healthful environment." *Id.* (quoting *Pioneer Processing*) (emphasis added).

More recently, in *Saline Co. Landfill v. IEPA*, PCB 02-108 (April 18, 2002), this Board acknowledged the Appellate Court's holding in *Land and Lakes* that the rights of State's Attorneys and Attorneys General are analogous. *Id.* at 3. The Board therefore held that the County in that case had standing to participate in the proceedings, and indeed should participate because otherwise its citizens "may be materially prejudiced absent the County's intervention." *Id.*

More recently still, in 2007, this Board confirmed that because a State's Attorney's rights and duties are analogous to those of the Attorney General, a State's Attorney may properly intervene to represent the public interest. *Fox Moraine v. United City of Yorkville*, PCB 07-146 (August 23, 2007). Notably, the Board's holding in *Fox Moraine* did not limit the right of

intervention to that of the County in which the proposed facility would be sited. (*See id.* at 1) (“...courts have also noted that intervention is based on the state’s attorney’s analogous rights and duties to the Attorney General, so that a state’s attorney may intervene to represent the public interest”)(emphasis added). In declining to limit intervention to the State’s Attorney of the county in which a facility would be located, the Board implicitly recognized that a landfill’s adverse impact may be felt well beyond the facility’s boundaries. In so holding, the Board also implicitly acknowledged that a landfill may adversely affect nearby communities and, as here, the contiguous county. The fact that the proposed landfill in this case would adversely impact Grundy County and its communities is well documented in the record on appeal, where such adverse impacts were the subject of testimony and other evidence in the proceedings below.

For example, Jeff Vogen testified for the City of Morris, which is located in Grundy County, concerning the landfill’s impact on air traffic in the immediate vicinity. Vogen pointed out that the primary landing path to the Morris Community Airport runs directly over the proposed landfill. (Tr. 1616-1618; 1624). Vogen testified concerning the close proximity of the airport operations area to the edge of the landfill footprint (2.3 miles), and the aviation danger posed by landfills due to their tendency to attract birds and other wildlife; he graphically demonstrated, with photographs and video segments, that bird and animal strikes can have potentially devastating consequences.¹ (Tr. 1622-1623; 1634-1637; 1638-1641; Morris Exh. 18-27). Mr. Vogen explained that the FAA recommends a five (5) statutory mile separation between the edge of an airport operations area and a wildlife attractant. (Tr. 1628-1629).

Although the Applicants’ expert, Dale Hoekstra, testified at the hearing that there were

¹ As the recent crash of US Air Flight 1549 demonstrated, bird strikes can indeed be devastating. *See, e.g.*, <http://cityroom.blogs.nytimes.com/2009/02/05/faa-releases-flight-1549-tapes-2/>

no reported bird strikes at the DuPage County Airport, which is located within two miles of the Settler's Hill Landfill, a facility operated by the Applicant (Tr. 422), and testified that the Applicant's bird control plan at Settler's Hill works "very well," Mr. Vogen testified that when he contacted officials at the DuPage County Airport, he was told there had been 30 wildlife strikes at that airport between 2001 and 2008, with 29 of those incidents involving birds. (Tr. 1644-46). (Moreover, it is interesting to note that ninety percent of the bird strikes at the DuPage County Airport occurred on the runway closest to the Settler's Hill Landfill, operated by Waste Management of Illinois, the Applicant in the instant proceeding). (Tr. 1647).

The Applicants' casual indifference toward air traffic safety shows that no serious thought was given to the danger that would be created by locating the proposed landfill near the Morris Community Airport. The safety concerns of the City of Morris, a Grundy County community, and the Morris Community Airport, as well as those of residents living in the area, will be unrepresented in this appeal unless Grundy County is permitted to intervene.

The Village President of Minooka, Illinois, also a Grundy County community, raised concerns about the proposed site's adverse impacts on the Village's water supply (Tr. 1298-99), and about the adverse traffic impacts and road damage in and around Minooka due to the landfill's truck traffic, which would be routed directly through the area. (Tr. 1289-92). Similarly, Mayor Richard Kopczick of the City of Morris testified concerning the Applicants' failure, in their traffic plan, to allow for diffusion of traffic, and the fact that the traffic plan calls for trucks to exit Interstate 80 at Route 47, which is already a busy thoroughfare that would be unduly taxed by the plan proposed by the Applicants. (Tr. 1773-1774).

Concerns such as those cited above, along with others raised during the siting hearing, are unique to Grundy County and the communities situated therein. There is, accordingly, no reason

to expect Kendall County to represent these interests, or to otherwise act as the representative of Grundy County. Rather, it is Grundy County's duty to represent its own interests in these proceedings, and it therefore requests leave to intervene and fulfill that duty.

CONCLUSION

Because this appeal is, procedurally speaking, in its infancy, with the record having been certified less than two weeks ago, Grundy County's motion to intervene is timely. Granting leave to intervene at this juncture will cause no undue delay, will not materially prejudice the proceeding, and will not otherwise interfere with an orderly or efficient proceeding.

Inasmuch as the residents of Grundy County are so situated that they may be adversely affected by the Board's order in this appeal, and because they may be materially prejudiced if their interests are not represented herein, Grundy County should be permitted to intervene to represent those interests, and should be allowed to participate fully in this appeal.

WHEREFORE, for the reasons set forth above, Grundy County respectfully requests that this Board grant the Motion to Intervene.

Dated: March 4, 2009 Respectfully submitted,

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Grundy County, Illinois

By:

/s/ Charles F. Helsten

One of Its Attorneys

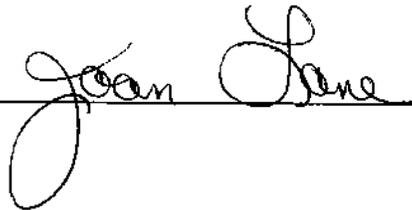
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on March 4, 2009, she served a copy of the foregoing upon:

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Via E-Mail and by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



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